



7050-01

LEGAL SERVICES CORPORATION

45 CFR Part 1640

Application of Federal law to LSC Recipients

AGENCY: Legal Services Corporation

ACTION: Final rule.

SUMMARY: This final rule updates the Legal Services Corporation (LSC or Corporation) regulation on the application of Federal law to LSC recipients. The FY 1996 appropriations act (incorporated in LSC's appropriations by reference annually thereafter) subjects LSC recipients and its employees and board members to Federal law relating to the proper use of Federal funds. This final rule provides recipients with notice of the applicable Federal laws each recipient and its employees and board members must agree to be subject to under this rule, the consequences of a violation of an applicable Federal law, and where LSC will maintain the list of applicable laws.

DATE: This final rule will be effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street N.W., Washington, DC 20007; (202) 295-1563 (phone), (202) 337-6519 (fax), or sdavis@lsc.gov.

SUPPLEMENTARY INFORMATION:

I. History of This Rulemaking

Section 504(a)(19) of LSC's FY 1996 appropriations act required LSC recipients to enter into a contract that subjected them to "all provisions of Federal law relating to the proper use of Federal funds." Sec. 504(a)(19), Pub. L. 104-134, title V; 110 Stat. 1321. By its terms, a violation of Sec. 504(a)(19) renders any LSC grant or contract null and void. The provision has been incorporated by reference into each of LSC's annual appropriations act since. Accordingly, the preamble and text of this final rule continue to refer to the relevant section number of the FY 1996 appropriations act.

The Corporation first issued 45 CFR Part 1640 as an interim rule in 1996 to implement Sec. 504(a)(19). 61 FR 45760, Aug. 29, 1996. The interim rule was put in place to provide immediate guidance to LSC recipients on legislation that was already in effect and carried significant penalties for noncompliance. *Id.* In the preamble to the interim rule, LSC announced that it was interpreting the statutory phrase "all provisions of Federal law relating to the proper use of Federal funds" to mean "with respect to [a recipient's] LSC funds, all programs should be subject to Federal laws which address issues of waste, fraud and abuse of Federal funds." *Id.* LSC based its interpretation on legislative history that appeared to limit the applicable laws to those dealing with fraud, waste, and abuse of Federal funds.

In particular, LSC relied on two congressional documents to support its interpretation. First, the Corporation cited to the House Report for H. R. 2076, which was a prior effort to enact a provision similar to section 504(a)(19). The relevant language in that report stated:

[S]ection 504(20) requires all programs receiving Federal funds to comply with Federal statutes and regulations governing waste, fraud, and abuse of Federal funds.

H. Rep. No. 104-196, 104th Cong., 1st Sess. 116 (July 1995) (emphasis added). Second, LSC cited section 5 of H. R. 1806, the Legal Services Reform Act of 1995, which was an unsuccessful attempt to revise the LSC Act. As an extension of his remarks introducing H.R. 1806, Rep. McCollum submitted a partial summary of the bill, including a discussion of section 5 entitled “Application of waste, fraud, and abuse laws.” 141 Cong. Rec. E1220-21 (daily ed. June 9, 1995). Section 5 itself was titled “Protection Against Theft and Fraud,” and expressly included provisions of Title 18 of the U.S. Code pertaining to criminal offenses involving the misuse of Federal funds, as well as provisions of the False Claims Act. H. R. 1806, 104th Cong., § 5 (1995).

LSC adopted the list of statutes in section 5, with one exception. Through negotiation with LSC’s Office of Inspector General (OIG), LSC determined that two other criminal statutes should be included in the list. 61 FR 45760, Aug. 29, 1996. These statutes prohibit bribery of public officials and witnesses and conspiracy to defraud the United States. Id. at 45761.

Minor changes to the interim rule, not affecting this list, were made before the final rule was published in 1997. 62 FR 19424-19427, Apr. 21, 1997. LSC has not revised Part 1640 since the publication of the final rule.

Since the final rule was published, Congress has amended or passed other Federal laws relating to the proper use of Federal funds. In 2014, OIG raised concerns that the § 1640.2(a)(1) list of applicable Federal laws is now under-inclusive. As an example, OIG noted the omission of 18 U.S.C. 666, which prohibits theft or bribery concerning programs receiving Federal funds and has been the basis for OIG’s referrals to the Department of Justice for prosecution. Subsequently, LSC staff researched other Federal

laws applicable to fraud, waste, and abuse of Federal funds. The search revealed at least two other Federal laws relating to the proper use of Federal funds currently missing from the § 1640.2(a)(1) list: 18 U.S.C. 285—Taking or using papers relating to claims, and 18 U.S.C. 1031—Major fraud against the United States.

As required by the LSC Rulemaking Protocol, LSC staff prepared an explanatory rulemaking options paper, accompanied by a proposed rule amending Part 1640. On January 22, 2015, the Operations and Regulations Committee (Committee) voted to authorize LSC to initiate rulemaking and to recommend that the LSC Board of Directors (Board) approve publishing the proposed rule. On January 24, 2015, the Board approved the proposed rule for publication in the Federal Register for notice and comment. LSC published the notice of the proposed rulemaking (the NPRM) in the Federal Register on February 3, 2015. 80 FR 5016, Feb. 3, 2015. The comment period remained open for thirty days and closed on March 5, 2015.

On April 12, 2015, the Committee considered the draft final rule for publication and voted to recommend its publication to the Board, subject to one amendment. The Committee voted to amend the language in § 1640.2(a) to explicitly state that the Board would vote at a public meeting on any proposed changes to the list of Federal laws relating to the proper use of Federal funds. The Committee made this amendment in response to a comment made during the meeting by the National Legal Aid and Defender Association (NLADA) expressing its position that proposed changes to the list should be subject to public comment prior to adoption by the Board. On April 14, 2015, the Board voted to adopt and publish the final rule as amended.

Material regarding this rulemaking is available in the open rulemaking section of LSC's website at <http://www.lsc.gov/about/regulations-rules/open-rulemaking>. After the effective date of the rule, those materials will appear in the closed rulemaking section at <http://www.lsc.gov/about/regulations-rules/closed-rulemaking>.

II. Section-by-Section Discussion of Comments and Regulatory Provisions

LSC received two comments during the public comment period. One comment was submitted by an LSC-funded recipient, Colorado Legal Services (CLS). The other comment was submitted by the non-LSC-funded non-profit NLADA through its Civil Policy Group and its Regulations and Policy Committee. Both commenters were generally supportive of the changes LSC proposed to Part 1640.

Proposed § 1640.1 - Purpose

LSC proposed revising this section to reflect the changes to Part 1640, specifically removing the language stating that the applicable Federal laws were identified in Part 1640. LSC received no comments on this proposal.

Proposed § 1640.2 – Applicable Federal laws

LSC proposed deleting the existing § 1640.2(a)(1) list of applicable Federal laws. The contracts between the Corporation and its recipients, currently referred to as the LSC Grant Assurances, will be modified to provide recipients with a weblink to the updated list. LSC proposed a new § 1640.2(a), which states that the Corporation will maintain a public list of applicable Federal law on the Corporation's website. LSC stated in the preamble of the NPRM that the list would be exhaustive but did not specifically use that term in the proposed rule text.

Comment 1: NLADA and CLS both expressed concern that LSC's decision to move the list of applicable Federal laws from the rule to LSC's website would decrease stakeholders' ability to comment on proposed changes to the list. NLADA noted that this was the second proposal by LSC in the past year to remove a section of a regulation from the usual rulemaking process. NLADA stated: "While we understand and support LSC's desire in this instance to avoid an unnecessary, time-consuming regulatory process, we want to confirm NLADA's very strong support" for LSC's commitment, expressed in the 2002 rulemaking protocol, to "conduct its rulemaking activities in a spirit of cooperative dialog with [] recipients and other interested parties." CLS similarly asserted that "[a]s LSC is a program uniquely committed to protecting due process rights and protections, it should adhere to them strictly itself and provide an opportunity for comment before the list of Federal laws relating to the proper use of Federal funds by LSC recipients is modified or changed."

Response: LSC views updating the list of applicable Federal laws to be an administrative task that does not affect the underlying substance of the rule. Updating the list does not materially change the Part 1640 requirement that recipients, and its employees and board members, comply with Federal laws relating to the proper use of Federal funds.

Although the regulation does not require notice and an opportunity for comment before submitting modifications of the list to the Board for approval, LSC remains committed to providing recipients with notice of any proposed modifications before a Board meeting. Recipients will have an opportunity to comment on the proposed modifications prior to and at the meeting where the modifications will be discussed.

Comment 2: CLS and NLADA supported LSC’s decision to make the list of applicable Federal laws exhaustive. In its comment, NLADA recommended that LSC include language in the text of the rule stating that the list is exhaustive.

Response: LSC will adopt NLADA’s recommendation. LSC will revise the first sentence of § 1640.2(a) to read: “LSC will maintain an exhaustive list of applicable Federal laws relating to the proper use of Federal funds on its website and provide recipients with a link to the list in the contractual agreement.”

LSC proposed renumbering § 1640.2(a)(2) as § 1640.2(b) and revising the language for clarity and readability. No substantive changes were made to this subsection. LSC received no comments on this proposal. LSC proposed redesignating existing § 1640.2(b)(1) and (2) as § 1640.4(a) and (c) respectively.

Proposed § 1640.3 – Contractual agreement

LSC proposed revising existing § 1640.3 for clarity and readability. No substantive changes were made to this subsection. LSC received no comments on this proposal.

Proposed § 1640.4 – Violation of agreement

LSC proposed redesignating existing § 1640.2(b)(1) and (2) as § 1640.4(a) and (c) respectively. The proposed move groups each definition in existing § 1640.2(b) with each definition’s consequence for violating the agreement in existing § 1640.4. No substantive changes were made, but the text has been revised for clarity and readability throughout the section. LSC received no comments on this proposal.

List of Subjects in 45 CFR Part 1640

Fraud; Grant programs-law; Legal services.

For the reasons stated in the preamble, the Legal Services Corporation revises 45 CFR part 1640 to read as follows:

PART 1640 – APPLICATION OF FEDERAL LAW TO LSC RECIPIENTS

Sec.

- 1640.1 Purpose.
- 1640.2 Applicable Federal laws.
- 1640.3 Contractual agreement.
- 1640.4 Violation of agreement.

Authority: 42 U.S.C. 2996e(g)

§ 1640.1 Purpose.

The purpose of this part is to ensure that recipients use their LSC funds in accordance with Federal law related to the proper use of Federal funds. This part also provides notice to recipients of the consequences of a violation of such Federal laws by a recipient, its employees or board members.

§ 1640.2 Applicable federal laws.

(a) LSC will maintain an exhaustive list of applicable Federal laws relating to the proper use of Federal funds on its website and provide recipients with a link to the list in the contractual agreement. The list may be modified with the approval of the Corporation's Board of Directors at a public meeting. LSC will provide recipients with notice when the list is modified.

(b) For the purposes of this part and the laws referenced in paragraph (a) of this section, LSC is considered a Federal agency and a recipient's LSC funds are considered Federal funds provided by grant or contract

§ 1640.3 Contractual agreement.

As a condition of receiving LSC funds, a recipient must enter into a written agreement with the Corporation that, with respect to its LSC funds, will subject the recipient to the applicable Federal laws relating to the proper use of Federal funds. The agreement must include a statement that all of the recipient's employees and board members have been informed of such Federal law and of the consequences of a violation of such law, both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) LSC will determine that a recipient has violated the agreement described in § 1640.3 when the recipient has been convicted of, or judgment has been entered against the recipient for, a violation of an applicable Federal law relating to the proper use of Federal funds with respect to its LSC grant or contract, by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for appeal has expired.

(b) A violation of the agreement by a recipient based on recipient conduct will result in the Corporation terminating the recipient's LSC grant or contract without need for a termination hearing. While an appeal of a conviction or judgment is pending, the Corporation may take any necessary steps to safeguard its funds.

(c) LSC will determine that the recipient has violated the agreement described in § 1640.3 when an employee or board member of the recipient has been convicted of, or judgment has been entered against the employee or board member for, a violation of an applicable Federal law relating to the proper use of Federal funds with respect to the recipient's grant or contract with LSC, by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for appeal has

expired, and the Corporation finds that the recipient has knowingly or through gross negligence allowed the employee or board member to engage in such activities.

(d) A violation of the agreement by the recipient based on employee or board member conduct will result in the Corporation terminating the recipient's LSC grant or contract. Prior to termination, the Corporation will provide notice and an opportunity to be heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities leading to the conviction or judgment. While an appeal of a conviction or judgment or a hearing is pending, the Corporation may take any necessary steps to safeguard its funds.

Date: April 15, 2015

Stefanie K. Davis

Assistant General Counsel

[FR Doc. 2015-08974 Filed: 4/17/2015 08:45 am; Publication Date: 4/20/2015]